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Supreme Court, U.S.
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Case Number _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

WILBUR BROWN,

Petitioner,

v.

LLOYD BENTSEN, SECRETARY OF THE UNITED STATES TREASURY

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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ORDER DENYING PETITION
FOR REHEARING EN BANC
Ninth Circuit Court of Appeal
Case No. 91-15006

The "Petition For Rehearing En Banc" shall be treated as a petition for rehearing and a suggestion for a rehearing en banc. The panel has voted to deny the petition for a rehearing. Judge Hall voted to reject the suggestion for reconsideration en banc. Judge Alarcon and Judge Dwyer so recommend.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested an en banc hearing. Fed. R. 35(b)

The petition for rehearing is denied and the suggestions for rehearing en banc is rejected.

Memorandum Decision of the
Ninth Circuit Court of Appeal
Case No. 91-15006

Before: ALARCON and HALL, Circuit Judges, and DWYER, District Judge.

Plaintiff-Appellant Wilbur Brown appeals from the order dismissing his action for wrongful termination from the Department of the Treasury on the ground that his claims were preempted by Title VII. Brown contends that the district court erred in dismissing his action because he was not required to exhaust his claims under Title VII before pursuing an action for violation of his Fifth Amendment due process rights. Brown also contends that the district court's error requires reversal because he has a valid due process claim that is not preempted by the Civil Service Reform Act of 1978, Pub. L. 950454, 92 Stat. 11 et seq. (codified

as amended in various sections of 5 U.S.C.) (CSRA).

I.

On June 27, 1987, Wilbur Brown began work at the United States Mint as a Metal Forming Machine Operator, grade WG-3, serving a one-year appointment. On December 6, 1987, Brown received a new appointment as a Temporary Forming Machine Operator, grade WG-6, which was to expire on December 6, 1988. During his employment, Brown periodically complained to his supervisors about pervasive racial discrimination at the United States Mint.

In May, 1988, United States Mint security personnel, having learned that eight years previously Brown had been tried and acquitted of first-degree murder charges, questioned Brown about the murder charges. United States Mint security

personnel told Brown that he would immediately have to answer, in writing, a set of written questions regarding the incident. Brown refused.

Brown continued his complaints to his superiors about workplace discrimination, and also complained that other employees of the United States Mint, who were actually convicted felons, had never been asked any questions about the crimes for which they had been convicted.

On August 17, 1988, the United States Mint terminated Brown for failure to cooperate in the security investigation regarding the murder charges. When Brown was terminated, his supervisor handed him forms for an appeal to the Merit Systems Protection Board (MSPB).

Brown appealed his discharge to the MSPB, alleging, inter alia, that his

discharge was motivated by racial discrimination. The administrative law judge dismissed the claim, holding that Brown's status as a temporary employee precluded the Board from exercising jurisdiction.

Brown then filed a complaint in federal district court. The first four claims for relief alleged that Brown had been discharged because of his race in violation of 42 U.S.C. 2000e-16 or in retaliation for whistle blowing. The fifth claim for relief alleged a violation of Brown's right to procedural due process and the sixth count sought an equitable remedy -- reinstatement -- for all claims presented.

The district court dismissed the complaint on the ground that Title VII of the Civil Rights Act of 1964, as amended,

42 U.S.C. 2000e-16, provides the sole remedy for racial discrimination i the federal workplace. The court held that Brown's claims, including his due process claim, arose from the same operative facts involving charges of employment discrimination, and were therefore precluded by his failure to exhaust his Title VII administrative remedies. Brown filed a timely notice of appeal to this court.

II.

The existence of jurisdiction is a question of law which we review de novo. United States v. Moncini, 882 F.2d 401, 403 (9th Cir. 1989).

On appeal, Brown has abandoned his Title VII employment discrimination claims, arguing only that neither Title VII nor CSRA preempts his due process

claim against the United States Mint. The Secretary argues that even if Title VII does not preempt Brown's due process claim, the claim must still be dismissed for lack of subject matter jurisdiction because the exclusive remedial scheme of CSRA preempts judicial consideration of any challenge by a federal employee, including an equitable constitutional challenge, to federal personnel decisions.

This court "may affirm the district court on any ground supported by the record, even if the ground is not relied on by the district court." Charley's Taxi Radio Dispatch v. SIDA of Hawaii, 810 F.2d 869, 874 (9th Cir. 1987). Because we hold that CSRA preempts Brown's claim, we need not reach the question of Title VII preemption.

Brown argues, first, that the

Secretary initially raised the CSRA preemption argument only in his reply memorandum below, and that therefore this court should refuse to consider it. The argument is meritless. "A party may question the existence of subject matter jurisdiction at any time during the proceedings." Building Material & Dump Truck Drivers, Local 420 v. Traweek, 879 F.2d 500, 505 (9th Cir. 1989).

Both parties agree that Brown, as a temporary federal employee, is specifically excluded from CSRA's judicial review provisions. Brown argues that because he is without any remedies under CSRA -- administrative or judicial -- he is outside the ambit of CSRA entirely and cannot be preempted by any of its provisions. The law is to the contrary. The exclusion of a class of federal

employees from the judicial review provisions of Chapter 75 of CSRA represents "a clear congressional intent to deny the excluded employees the protections of Chapter 75 -- including judicial review -- for personnel action covered by that chapter." United States v. Fausto, 484 U.S. 439, 447 (1987). Furthermore, the absence of remedies under CSRA is irrelevant to CSRA preemption of judicial review. Saul v. United States, 928 F.2d 829, 839-40 (9th Cir. 1991).

Brown's argument turns CSRA on its head. He suggests that CSRA's statutory scheme allows temporary employees immediate access to the federal district courts for their unconstitutional discharge claims while permanent employees must seek administrative review through the MSPB for identical claims with

judicial review available only in the Federal Circuit. 5 U.S.C. 7513(d), 7703. Brown's logic undermines "the preferred position of certain categories of employees" under CSRA and drains the MSPB of its "primacy . . . for administrative resolution of disputes over adverse personnel action." Fausto, 484 U.S. at 449.

Brown next argues that even if CSRA applies to him, it preempts only constitutional tort claims for damages (Bivens claims), not constitutional claims seeking equitable remedies such as reinstatement. As Brown acknowledges, this court has already held that CSRA preempts equitable constitutional claims. Saul v. United States, 928 F.2d at 843. Nevertheless Brown urges us to reject Saul as poorly reasoned and adopt the approach

of the District of Columbia Circuit, which finds no CSRA preemption of constitutional claims seeking equitable relief. Spagnola v. Mathis, 859 F.2d 223, 220-30 (D.C. Cir. 1988).

Only an en banc court of this circuit may overrule our precedent absent an intervening Supreme Court decision or act of Congress. United States v. Frank, 933 F.2d 1491, 1500 (9th Cir.), superseded on other grounds, 956 F.2d 872 (9th Cir. 1991), cert. denied, 61 U.S.L.W. 3283 (U.S. Oct. 13, 1992) (No. 91-8230); Pratt v. McCarthy, 850 F.2d 590, 593 (9th Cir. 1988). As Brown himself recognizes, Saul controls this case. The complaint must be dismissed.

AFFIRMED.

Concurring Opinion of HALL, Circuit Judge

Brown argues in this appeal that neither Title VII nor the Civil Service Reform Acts ["CSRA"] preempts his due process claim against the United States Mint. I believe we need not decide the difficult jurisdictional questions that argument raises, nor the applicability here of Saul v. United States, because Brown's due process claim is untenable. See Federal Insurance Co. v. Scarsella Bros. Inc., 931 F.2d 599, 602 (9th Cir. 1991) ("Where an appeal presents difficult questions concerning jurisdiction, we may forego the resolution of such issues if the merits of the appeal are insubstantial.") Thus, I would affirm the district court's dismissal for failure to state a claim on the grounds that Brown can prove no set of facts in support of

his due process claim.

In order to establish a claim under the Fifth Amendment Due Process Clause, Brown must show that he had either a liberty or property interest in his continued employment that was subject to procedural protections. He concedes that he did not allege any facts demonstrating that his dismissal from the Mint violated a protected liberty interest. And as a temporary employee specifically subject to summary dismissal at any time, Brown had no entitlement to continue employment at the Mint, and must has no basis for claiming a protected property interest.

I concur in the panel's decision to affirm the district court's dismissal of this action, but on the ground stated above.

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ORDER OF DISMISSAL
Opinion by Patel, J.
United States District Court
Northern District of California
Case No. C-89-0102-MHP

Defendant's motion to dismiss or for summary judgment came on for hearing before this Court on Monday, September 24, 1990, pursuant to notice duly given. At the hearing, plaintiff was represented by his attorney Elizabeth A. Principato-Phipps, and defendant was represented by Assistant United States Attorney Beth McGarry.

The Court has considered the first amended complaint on file herein, together with the written memoranda and oral argument submitted by counsel in connection with this motion and, where appropriate, the evidence properly before the Court. The Court also has conducted its own research into the applicable law

regarding the issues raised by this action and the defendant's motion to dismiss. For the reasons set forth below and in this court's bench order, the Court has concluded that defendant's motion is well taken and should be granted in its entirety. Because the Court is granting defendant's motion to dismiss, it denies plaintiff's motion to compel discovery and award sanctions and grants defendant's motion to stay discovery.

Plaintiff seeks redress for alleged discrimination in federal employment based on race and color. In addition to seeking relief herein pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16, plaintiff also asserts causes of action, arising out of the same operative facts, based on claims that defendant's actions violated the Fifth

Amendment and 5 U.S.C. 2302 and 7532, and perhaps other statutes as well. Title VII, however, provides the exclusive remedy available to federal employees complaining of employment discrimination based on, inter alia, race or color, and thus Title VII is preemptive of any other federal law concerning discrimination based on any of the factors set forth in Title VII. Brown v. General Services Administration, 425 U.S. 810 (1976). Therefore, to the extent plaintiff's first amended complaint seeks to assert any claim other than pursuant to Title VII, it must be dismissed for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Similarly, plaintiff's request for punitive damages and other relief not available under Title VII also must be

dismissed for the same reason.

Plaintiff failed to exhaust administrative remedy as to any of his discrimination claims. As to the claim arising out of his discharge, plaintiff failed to exhaust in a timely manner his administrative remedies for allegations of discrimination. Defendant discharged plaintiff on August 17, 1988. Plaintiff, with the assistance of counsel, filed an appeal of his dismissal to the Merits System Protection Board on August 25, 1988. This initial appeal was devoid of any allegation of race discrimination. Two months after his discharge, plaintiff raised, for the first time, an allegation of race discrimination in an amended appeal filed with the Merits System Protection Board. On December 16, 1988, the Merits System Protection Board

dismissed plaintiff's appeal for lack of jurisdiction. Plaintiff, as a temporary employee, was not entitled to appeal his removal to the Board. Only an individual who meets the definition of an "employee" under 5 U.S.C. 7511(a)(1) is entitled to appeal a removal to the Merits System Protection Board. 5 U.S.C. 7513(d) and 7701(a). Plaintiff did not initiate a complaint through the agency's EEO process to complain that his removal was based on prohibited discrimination. When this appeal was dismissed by the Merits System Protection Board for lack of jurisdiction, plaintiff brought this action in District Court.

This is not a "mixed case" as defined by 5 U.S.C. 7702. Dismissal by the MSPB for lack of jurisdiction does not avoid the procedural requirements for bringing a

Title VII action against the federal defendant. Plaintiff must timely exhaust his administrative remedies before coming into Federal court. In this case, plaintiff made no attempt to proceed through the EO Counselor or pursue agency procedures. He made no attempt to state a claim of discrimination until well after the required period had expired.

As to all of plaintiff's claims arising out of alleged discriminatory acts or practices occurring prior to plaintiff's discharge, the court concludes that dismissal is appropriate because plaintiff failed to initiate any attempt to exhaust his administrative remedies with respect to those claims. In that regard, plaintiff's first amended complaint and his declaration submitted in opposition to defendant's motions are

devoid of nay allegation which would explain or excuse his failure to initiate the administrative EEO remedy process. Therefore, relief may not be granted on those claims, and the Court lacks subject matter jurisdiction over them.

Accordingly, defendant's motion is granted in its entirety and this action is dismissed with prejudice.

5 U.S.C. 701 et seq.

701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that-

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter-

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include-

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of

the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50,

appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim than an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the

United States or that the United States is an indispensable party. The Untied States may be named as a defendant in any such action, and a judgment or decree may be entered against the United Stated: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable grounds; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

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703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial

enforcement.

704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency

authority.

705. Relief pending review

When an agency finds that justice so required, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

706. Scope of review

To the extent necessary to decision and when presented, the reviewing court

shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be-

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory

jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of

prejudicial error.

5 U.S.C. 2301 et. seq.

2301. Merit system principles

(a) This section shall apply to-

(1) an Executive agency; and

(2) the Government Printing Office.

(b) Federal personnel management should be implemented consistent with the following merit system principles:

(1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which

assures that all receive equal opportunity.

(2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

(3) Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence.

(4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.

(5) The Federal work force should be used efficiently and effectively.

(6) Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.

(7) Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.

(8) Employees should be-

(A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes, and

(B) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.

(9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences-

(A) a violation of any law, rule, or regulation, or

(B) mismanagement, a gross waste of funds, an abuse of

authority, or a substantial and specific danger to public health or safety.

(c) In administering the provisions of this chapter-

(1) with respect to any agency (as defined in section 2302(a)(2)(C) of this title), the President shall, pursuant to the authority otherwise available under this title, take any action, including the issuance of rules, regulations, or directives; and

(2) with respect to any entity in the executive branch which is not such an agency or part of such an agency, the head of such entity shall, pursuant to authority otherwise available, take any action, including the issuance of rules,

regulations, or directives;

which is consistent with the provisions of this title and which the President or the head, as the case may be, determines is necessary to ensure that personnel management is based on and embodies the merit system principles.

2302. Prohibited personnel practices

(a)(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b) of this section.

(2) For the purpose of this section-

(A) "personnel action" means-

(i) an appointment;

(ii) a promotion;

(iii) an action under chapter 75 of this title or other disciplinary or corrective action;

(iv) a detail, transfer, or reassignment;

(v) a reinstatement;

(vi) a restoration;

(vii) a reemployment;

(viii) a performance evaluation under chapter 43 of this title;

(ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; and

(x) any other significant change in duties or responsibilities which is

inconsistent with the employee's salary or grade level;

(B) "covered position" means any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include-

(i) a position which is excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or

(ii) any position excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of

good administration.

(C) "agency" means an Executive agency and the Government Printing Office, but does not include-

(i) a Government corporation;

(ii) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, and, as determined by the President, any Executive agency or unity thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or

(iii) the General Accounting Office.

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority-

(1) discriminate for or against any employee or applicant for employment-

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

(B) on the basis of age as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

(C) on the basis of sex, as prohibited under section 6(d) of

the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));

(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of-

(A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or

(B) an evaluation of the character, loyalty, or suitability of such individual;

(3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;

(4) deceive or willfully obstruct any person with respect to such person's right to compete for

employment;

(5) influence any person to withdraw from competition for any position for the purpose of improving or injuries the prospects of any other person for employment;

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

(7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian

position any individual who is a relative (as defined in section 3110(a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110(a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official;

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of-

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences-

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, or to the

Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences-

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waster of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee

or applicant for employment because of-

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A);

(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) for refusing to obey an order that would require the individual to violate a law;

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States; or

(11) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained

in section 2301 of this title.

This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress.

(c) The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management. Any individual to whom the head of any agency delegated authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.

(d) This section shall not be construed to extinguish or lessen any

effort to achieve equal employment opportunity through affirmative action or any right or remedy available to any employee or applicant for employment in the civil service under-

(1) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), prohibiting discrimination on the basis of race, color, religion, sex, or national origin;

(2) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), prohibiting discrimination on the basis of age;

(3) under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)), prohibiting discrimination on the basis of sex;

(4) section 501 of the

Rehabilitation Act of 1973 (29 U.S.C. 791), prohibiting discrimination on the basis of handicapping condition; or

(5) the provisions of any law, rule, or regulation prohibiting discrimination on the basis of marital status or political affiliation.

2303. Prohibited personnel practices in the Federal Bureau of Investigation

(a) Any employee of the Federal Bureau of Investigation who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or fail to take a personnel action with respect to any employee of the Bureau as a reprisal for a disclosure of information by the employee to the Attorney General

(or an employee designated by the Attorney General for such purpose) which the employee or applicant reasonably believes evidences-

(1) violation of any law, rule, or regulation, or

(2) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

For the purpose of this subsection, "personnel action" means any action described in clauses (i) through (x) of section 2302(a)(2)(A) of this title with respect to an employee in, or applicant for, a position in the Bureau (other than a position of a confidential, policy-determining, policymaking, or policy-advocating character).

(b) The Attorney General shall

prescribe regulations to ensure that such a personnel action shall not be taken against an employee of the Bureau as a reprisal for any disclosure of information described in subsection (a) of this section.

(c) The President shall provide for the enforcement of this section in a manner consistent with applicable provisions of sections 1214 and 1221 of this title.

2304. Responsibility of the General Accounting Office

(a) If requested by either House of Congress (or any committee thereof), or if considered necessary by the Comptroller General, the General Accounting Office shall conduct audits and reviews to assure compliance with the laws, rules, and regulations governing employment in the

executive branch and in the competitive service and to assess the effectiveness and soundness of Federal personnel management.

(b) The General Accounting Office shall prepare and submit an annual report to the President and the congress on the activities of the Merit Systems Protection Board and the Office of Personnel Management. The report shall include a description of-

(1) significant actions taken by the Board to carry out its functions under the title; and

(2) significant actions of the Office of Personnel Management, including an analysis of whether or not the actions of the Office are in accord with merit system principles and free from prohibited personnel

practices.

2305. Coordination with certain other provisions of law

No provision of this chapter, or action taken under this chapter, shall be construed to impair the authorities and responsibilities set forth in Section 102 of the National Security Act of 1947 (61 Stat. 495; 50 U.S.C. 403), the Central Intelligence Agency Act of 1949 (63 Stat. 208; 50 U.S.C. 403a and following), the Act entitled "An Act to provide certain administrative authorities for the National Security Agency, and for other purposes," approved May 29, 1959 (73 Stat. 63; 50 U.S.C. 402 note), and the Act entitled "An Act to amend the Internal Security Act of 1950)", approved March 26, 1964 (78 Stat. 168; 50 U.S.C. 831-835).

5 U.S.C. 7501 et. seq.

7501. Definitions

For the purpose of this subchapter-

(1) "employee" means an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less; and

(2) "suspension" means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay.

7502. Actions covered

This subchapter applies to a suspension for 14 days or less, but does not apply to a suspension under section 7521 or 7532 of this title or any action initiated under section 1215 of this

title.

7503. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an employee may be suspended for 14 days or less for such cause as will promote the efficiency of the service (including discourteous conduct to the public confirmed by an immediate supervisor's report of four such instances within any one-year period or any other pattern of discourteous conduct).

(b) An employee against whom a suspension for 14 days or less is proposed is entitled to-

(1) an advance written notice stating the specific reasons for the proposed action;

(2) a reasonable time to answer orally and in writing and to furnish

affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) Copies of the notice of proposed action, the answer of the employee if written, a summary thereof if made orally, the notice of decision and reasons therefor, and any order effecting the suspension, together with any supporting material, shall be maintained by the agency and shall be furnished to the Merit Systems Protection Board upon its request and to the employee affected upon the employee's request.

7504. Regulations

The Office of Personnel Management

may prescribe regulations to carry out the purpose of this subchapter.

7511. Definitions; application

(a) For the purpose of this subchapter-

(1) "employee" means-

(A) an individual in the competitive service-

(i) who is not serving a probationary or trial period under an initial appointment; or

(ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;

(B) a preference eligible in the excepted service who has

completed 1 year of current continuous service in the same or similar positions-

(i) in an Executive agency; or

(ii) in the United States Postal Service or Postal Rate Commission; and

(C) an individual in the excepted service (other than a preference eligible)-

(i) who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or

(ii) who has completed 2 years of current continuous service in the

same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less;

(2) "suspension" has the same meaning as set forth in section 7501(2) of this title;

(3) "grade" means a level of classification under a position classification system;

(4) "pay" means the rate of basic pay fixed by law or administrative action for the position held by an employee; and

(5) "furlough" means the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons.

(b) This subchapter does not apply to an employee-

(1) whose appointment is made by and with the advice and consent of the Senate;

(2) whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character by-

(A) the President for a position that the President has excepted from the competitive service; or

(B) the Office of Personnel Management for a position that the Office has excepted from the competitive service; or

(C) the President or the head of an agency for a position excepted from the competitive

service by statute;

(3) whose appointment is made by the President;

(4) who is receiving an annuity from the Civil Service Retirement and Disability Fund, or the Foreign Service Retirement and Disability Fund, based on the service of such employee;

(5) who is described in section 8337(h)(1), relating to technicians in the National Guard;

(6) who is a member of the Foreign Service, as described in section 103 of the Foreign Service Act of 1980;

(7) whose position is within the Central Intelligence Agency or the General Accounting Office;

(8) whose position is within the

United States Postal Service, the Postal Rate Commission, the Panama Canal Commission, the Tennessee Valley Authority, the Federal Bureau of Investigation, the National Security Agency, the Defense Intelligence Agency, or an intelligence activity of a military department covered under section 1590 of title 10, unless subsection (a)(1)(B) of this section or section 1005(a) of title 39 is the basis for this subchapter's applicability;

(9) who is described in section 5102(c)(11) of this title; or

(10) who holds a position within the Veterans Health Administration which has been excluded from the competitive service by or under a provision of title 38, unless such

employee was appointed to such position under section 7401(3) of such title.

(c) The Office may provide for the application of this subchapter to any position or group of positions excepted from the competitive service by regulation of the Office which is not otherwise covered by this subchapter.

7512. Actions covered

This subchapter applies to-

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but does not apply to-

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title, or

(E) an action initiated under section 1215 or 7521 of this title.

7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to-

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by

regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

7514. Regulations

The Office of Personnel Management may prescribe regulations to carry out the purpose of this subchapter, except as it concerns any matter with respect to which the Merit Systems Protection Board may prescribe regulations.

EXECUTIVE ORDER 10450
SECURITY REQUIREMENTS FOR GOVERNMENT EMPLOYMENT

WHEREAS the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, or good conduct and character, and of complete and unswerving loyalty to the United States; and

WHEREAS the American tradition that all persons should receive fair,

impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privileged to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the United States (5 U.S.C. 631); the Civil Service Act of 1883 (22 Stat. 403; 5 U.S.C. 732, et seq.); section 9A of the act of August 2, 1939, 53 Stat. 1148 (5 U.S.C. 118 j); and the act of

August 26, 1950, 64 Stat. 476 (5 U.S.C. 22-1 et seq.), and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

SECTION 1. In addition to the departments and agencies specified in the said act of August 26, 1950, and Executive Order No. 10237 of April 26, 1951, the provisions of that act shall apply to all other departments and agencies of the Government.

SEC. 2. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within

the department or agency is clearly consistent with the interests of the national security.

SEC. 3. (a) The appointment of each civilian officer or employee in any department or agency of the Government shall be made subject to investigation. The scope of the investigation shall be determined in the first instance according to the degree of adverse effect the occupant of the position sought to be filled could bring about, by virtue of the nature of the position, on the national security, but in no event shall the investigation include less than a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation), and written inquiries to appropriate local law-enforcement agencies, former employers and

supervisors, references, and schools attended by the person under investigation: *Provided,* that upon request of the head of the department or agency concerned, the civil Service Commission may, in its discretion, authorize such less investigation as may meet the requirements of the national security with respect to per-diem, intermittent, temporary, or seasonal employees, or aliens employed outside the United States. Should there develop at any stage of investigation information indicating that the employment of any such person may not be clearly consistent with the interests of the national security, there shall be conducted with respect to such person a full field investigation, or such less investigation as shall be sufficient to enable the head of the

department or agency concerned to determine whether retention of such person is clearly consistent with the interests of the national security.

(b) The head of any department or agency shall designate, or cause to be designated, any position within his department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position. Any position so designated shall be filled or occupied only by a person with respect to whom a full field investigation has been conducted: *Provided,* that a person occupying a sensitive position at the time it is designated as such may continue to occupy such position pending the completion of a full field investigation, subject to the

other provisions of this order: *And provided further,* that in case of emergency a sensitive position may be filled for a limited period by a person with respect to whom a full field pre-appointment investigation has not been completed if the head of the department or agency concerned finds that such action is necessary in the national interest, which finding shall be made a part of the records of such department or agency.

SEC. 4. The head of each department and agency shall review, or cause to be reviewed, the cases of all civilian officers and employees with respect to whom there has been conducted a full field investigation under Executive Order No. 9835 of March 21, 1947, and, after such further investigation as may be appropriate, shall re-adjudicate, or cause

to be re-adjudicated, in accordance with the said act of August 26, 1950, such of those cases as have not bee adjudicated under a security standard commensurate with that established under this order.

SEC. 5. Whenever there is developed or received by any department or agency information indicating that the retention in employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, such information shall be forwarded to the head of the employing department or agency or his representative, who, after such investigation as may be appropriate, shall review, or cause to be reviewed, and, where necessary, re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, the case

of such officer or employee.

SEC. 6. Should there develop at any stage of investigation information indicating that the employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, the head of the department or agency concerned or his representative shall immediately suspend the employment of the person involved if he deems such suspension necessary in the interests of the national security and, following such investigation and review as he deems necessary, the head of the department or agency concerned shall terminate the employment of such suspended officer or employee whenever he shall determine such termination necessary or advisable in the interests of the national security, in accordance with the

said act of August 26, 1950.

SEC. 7. Any person whose employment is suspended or terminated under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950, or pursuant to the said Executive Order No. 9835 or any other security or loyalty program relating to officers or employees of the Government, shall not be reinstated or restored to duty or reemployed in the same department or agency and shall not be reemployed in any other department or agency, unless the head of the department or agency concerned finds that such reinstatement, restoration, or reemployment is clearly consistent with the interests of the national security, which finding shall be made a part of the records of such department or agency:

Provided, that no person whose employment has been terminated under such authority thereafter may be employed by any other department or agency except after a determination by the Civil Service Commission that such person is eligible for such employment.

SEC. 8. (a) The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

(1) Depending on the relation of the Government employment to the national security:

(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(ii) Any deliberate misrepresentations, falsifications, or omissions of material facts.

(iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.

(iv) An adjudication of insanity, or treatment for serious mental or neurological disorder without satisfactory evidence of cure.

(v) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the

national security.

(2) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(3) Establishing or continuing a sympathetic association with a saboteur, spy, traitor, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the government of the United States or the alteration of the form of government of the United States by unconstitutional

means.

(4) Advocacy of use of force or violence to overthrow the government of the United States, or of the alteration of the form of government of the United States by unconstitutional means.

(5) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means.

(6) Intentional, unauthorized

disclosure to any person of security information, or of other information disclosure of which is prohibited by law, or willful violation or disregard of security regulations.

(7) Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

(b) The investigation of persons entering or employed in the competitive service shall primarily be the responsibility of the Civil Service Commission, except in cases in which the head of a department or agency assumes that responsibility pursuant to law or by agreement with the Commission. The Commission shall furnish a full investigative report to the department or

agency concerned.

(c) The investigation of persons (including consultants, however employed), entering employment of, or employed by, the Government other than in the competitive service shall primarily be the responsibility of the employing department or agency. Departments and agencies without investigative facilities may use the investigative facilities of the Civil Service Commission, and other departments and agencies may use such facilities under agreement with the Commission.

(d) There shall be referred promptly to the Federal Bureau of Investigation all investigations being conducted by any other agencies which develop information indicating that an individual may have been subjected to coercion, influence, or pressure to act contrary to the interests

of the national security, or information relating to any of the matters described in subdivisions (2) through (7) of subsection (a) of this section. In cases so referred to it, the Federal Bureau of Investigation shall make a full field investigation.

SEC. 9. (a) There shall be established and maintained in the Civil Service Commission a security-investigations index covering all persons as to whom security investigations have been conducted by any department or agency of the Government under this order. The central index established and maintained by the Commission under Executive Order No. 9835 of March 21, 1947, shall be made a part of the security-investigations index. The security-investigations index shall contain the name of each person

investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted an investigation concerning the person involved or has suspended or terminated the employment of such person under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950.

(b) The heads of all departments and agencies shall furnish promptly to the Civil Service Commission information appropriate for the establishment and maintenance of the security-investigations index.

(c) The reports and other investigative material and information developed by investigations conducted pursuant to any statute, order, or program

described in section 7 of this order shall remain the property of the investigative agencies conducting the investigations, but may, subject to considerations of the national security, be retained by the department or agency concerned. Such reports and other investigative material and information shall be maintained in confidence, and no access shall be given thereto except, with the consent of the investigative agency concerned, to other departments and agencies conducting security programs under the authority granted by or in accordance with the said act of August 26, 1950, as may be required for the efficient conduct of Government business.

SEC. 10. Nothing in this order shall be construed as eliminating or modifying in any way the requirement for any

investigation or any determination as to security which may be required by law.

SEC. 11. On and after the effective date of this order the Loyalty Review Board of March 21, 1947, shall not accept agency findings for review, upon appeal or otherwise. Appeals pending before the Loyalty Review Board on such date shall be heard to final determination in accordance with the provisions of the said Executive Order No. 9835, as amended. Agency determinations favorable to the officer or employee concerned pending before the Loyalty Review Board on such date shall be acted upon by such Board, and whenever the Board is not in agreement with such favorable determination the case shall be remanded to the department or agency concerned for determination in accordance with the standards and procedures

established pursuant to this order. Cases pending before the regional loyalty boards of the Civil Service Commission on which hearings have not been initiated on such date shall be referred to the department or agency concerned. Cases being heard by regional loyalty boards on such date shall be heard to conclusion, and the determination of the board shall be forwarded to the head of the department or agency concerned: *Provided*, that if no specific department or agency is involved, the case shall be dismissed without prejudice to the applicant. Investigations pending in the Federal Bureau of Investigation or the Civil Service Commission on such date shall be completed and the reports thereon shall be made to the appropriate department or agency.

SEC. 12. Executive Order No. 9835 of March 21, 1947, as amended, is hereby revoked. For the purposes described in section 11 hereof the Loyalty Review Board and the regional loyalty boards of the Civil Service Commission shall continue to exist and function for a period of one hundred and twenty days from the effective date of this order, and the Department of Justice shall continue to furnish the information described in paragraph 3 of Part III of the said Executive Order No. 9835, but directly to the head of each department and agency.

SEC. 13. The Attorney General is requested to render to the heads of departments and agencies such advice as may be requisite to enable them to establish and maintain an appropriate employee-security program.

SEC. 14. (a) The Civil Service Commission, with the continuing advice and collaboration of representatives of such departments and agencies as the National Security Council may designate, shall make a continuing study of the manner in which this order is being implemented by the departments and agencies of the Government for the purpose of determining:

(1) Deficiencies in the department and agency security programs established under this order which are inconsistent with the interests of, or directly or indirectly weaken, the national security.

(2) Tendencies in such programs to deny to individual employees fair, impartial, and equitable treatment at the hands of the Government, or rights under the Constitution and laws of the United Stated or this order.

Information affecting any department or agency developed or received during the course of such continuing study shall be furnished immediately to the head of the department or agency concerned. The Civil Service Commission shall report to the National Security Council, at least semiannually, on the results of such study, and shall recommend means to correct any such deficiencies or tendencies.

(b) All departments and agencies of the Government are directed to cooperate with the Civil Service Commission to facilitate the accomplishment of the responsibilities assigned to it by subsection (a) of this section.

SEC. 15. This order shall become effective thirty days after the date hereof.